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In the Supreme Court

OF THE

United States

October Term, 1934

HILDEGARD SCHOENAMSGRUBER, by Gustav Schoenamsgruber, her guardian,

Petitioner,

vs.

THE HAMBURG AMERICAN LINE (a corporation), Claimant of the Motorship "The Oakland," her engines, etc.,

Respondent,

and

GUSTAV SCHOENAMSGRUBER,

Petitioner,

vs.

THE HAMBURG AMERICAN LINE (a corporation), Claimant of the Motorship "The Oakland," her engines, etc.,

Respondent.

Nos. 424 and 425

PETITION FOR A REHEARING

On Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit

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To Honorable Charles Evans Hughes, Chief Justice of the United States, and to the Honorable Associate Justices of the Supreme Court of the United States:

The petitioners above named respectfully ask a rehearing of the above entitled causes decided by this

Honorable Court on March 4th, 1935. We respectfully urge the following grounds for a rehearing:

YOUR HONORABLE COURT HAS ERRONEOUSLY DECIDED THAT THE APPEALS HEREIN WERE NOT TAKEN "FROM AN INTERLOCUTORY DECREE IN ADMIRALTY DETERMINING THE RIGHTS AND LIABILITIES OF THE PARTIES," WITHIN THE MEANING OF THE ACT OF APRIL 3, 1926, 44 STAT. 233.

As the pleadings and proceedings in the lower court are fully set forth in the briefs, we shall not restate them here. Suffice it to say that the Circuit Court of Appeals dismissed the appeals herein on the ground that the order of the District Court compelling the parties to proceed to arbitration in conformity with the purported stipulation contained in the Contract of Carriage, alleged to have entered into between respondents and the mother of the infant libelant (one of the petitioners herein), was an interlocutory order and therefore not appealable.

In support of our contention that the order was final and appealable, we argued that the order fixed and determined the rights of the parties in that it was a judgment or decree enforcing the arbitration provisions in the contract. It was, therefore, in the language of the Circuit Court of Appeals in KRAUSS BROS. v. BOSSERT & SONS, 62 Fed. (2d) 1004, *"essentially an escape from judicial trial; the court takes a hand only so far as some sanction is necessary*

to compel the performance of the agreement to adopt the means provided."

To state the matter otherwise, Title 9 U. S. C. A. provides for the enforcement of arbitration agreements in proceedings in admiralty, and for a stay of proceedings pending such arbitration. When an order directing the parties to proceed to arbitration is made, the proceedings under the libel are at an end; the controversy is then sent to the arbitrator; the court performs no other function except to enter a judgment or decree on the award. The court retains no power to hear and determine the cause on the merits, or to render a decree on the facts. The only remedy of the aggrieved party is under Section 10 of the Act, which reads as follows:

> "In either of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration—
>
> (a) Where the award was procured by corruption, fraud, or undue means.
>
> (b) Where there was evident partiality or corruption in the arbitrators, or either of them.
>
> (c) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced.
>
> (d) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

(e) Where an award is vacated and the time within which the agreement required the award to be made has not expired the court may, in its discretion, direct a rehearing by the arbitrators."

As is well said in KRAUSS BROS. v. BOSSERT & SONS, supra: "The judgment follows automatically unless the award has been vacated under Section 10, *and that is an independent application.*" Accordingly, the decree directing arbitration is a final decree in admiralty since it denies the libelant his judicial remedy and remits him to the judgment of an arbitrator, perhaps unskilled in the law and usually, as in this case, selected by his adversary. The court thereafter is a mere medium through which, or an arm by which, the decision of the arbitrator may be enforced. That we have not misconstrued the effect and consequences of the decree, we quote the language of Section 11:

"In either of the following cases the United States court in and for the district wherein the award was made may make an order modifying or correcting the award upon the application of any party to the arbitration—

(a) Where there was an evident material miscalculation of figures or an evident material mistake in the description of any person, thing, or property referred to in the award.

(b) Where the arbitrators have awarded upon a matter not submitted to them, unless it is a matter not affecting the merits of the decision upon the matter submitted.

(c) Where the award is imperfect in matter of form *not affecting the merits of the controversy.*

> The order may modify and correct the award, *so as to effect the intent thereof* and promote justice between the parties."

The Section last quoted thus precludes a hearing on the merits of the controversy by the court. The claimant is ousted of his judicial remedy. May we not by way of analogy suggest that it would be fully as logical to hold that any final judgment is not final because it might thereafter be impeached for fraud in its procurement—either by motion in the court in which it was rendered, by a proceeding in the nature of a writ of error *coram nobis,* or by a suit in equity for its annulment? We repeat that the order enforcing the provision for arbitration is a final disposition of the cause. The power reserved by the court is only to do the ministerial, not the judicial, act of entering judgment upon the award and enforcing the same. It is a duty which might with equal propriety be delegated to the clerk. Unless the aggrieved party institutes an independent proceeding under Section 10, or Section 11 of the Act, to vacate the award, the decision of the arbiter is in all respects final.

In both the petition for a Writ of Certiorari granted by this court, and in our brief, we showed, conclusively, we submit, that the decision of the Circuit Court of Appeals in the instant case was at variance with every prior decision of every court, state and federal, in which the question of the finality of such an order has arisen.

See:

KRAUSS BROS. v. BOSSERT & SONS, supra;

MARCHANT v. MEAD MFG. CO., 252 N. Y. 284, 169 N. E. 386 (opinion of Mr. Justice Cardozo);

HOSIERY MFG. CORP. v. GOLDSTON, 238 N. Y. 22, 143 N. E. 777;

IN RE UTILITY OIL CORP., 68 Fed. (2d) 524;

CALIFORNIA PRUNE AND APRICOT GROWERS' ASS'N v. KATZ AMERICAN CO., 60 Fed. (2d) 788.

No decision pronouncing a contrary rule was cited by respondents and none is cited in the opinion of Mr. Justice Butler, saving SHANFEROKE CORP. v. WESTCHESTER, 79 L. ed. 5. It is true that in the case last mentioned Mr. Justice Brandeis says that:

> "The order of the District Court denying the stay was not a final judgment appealable under Section 128 of the Judicial Code,"

but the court holds that as an interlocutory order, having the effect of a denial of an injunction, it was appealable under Section 129.

A different Section (Section 3, Title 9, U. S. C. A.) was there involved, the action being one at law for the breach of a contract to purchase coal. The one decision cited by Justice Brandeis in support of the statement that the order of the District Court granting the stay was not a final and appealable judgment, is

GENERAL ELECTRIC CO v. MARVEL, 287 U. S. 430. That case, which did not involve arbitration, states merely the legal truism that review of interlocutory orders must generally await appeal from the final decree. The order there appealed from, dismissing a counterclaim, was properly held an interlocutory order which could be reviewed only on appeal from the final judgment. Here, however, the libelant has no such remedy, as there is no appeal on the law and the facts from the decision of the arbitrator, as in other causes in admiralty. Into the merits of the arbitrator's decision the District Court cannot go. The court becomes merely a registrar of the edict of the representative of a foreign power. Not alone the power of our courts, but our own national sovereignty is subservient to the whim and caprice of the emissary of the *petit corporal* of the Reich.

Similar observations may be made as to the other decisions cited in the footnote to Mr. Justice Butler's opinion.

ARNOLD v. UNITED STATES, 263 U. S. 427, was an action on a contractor's bond. It was held that a judgment of a Circuit Court of Appeals modifying a judgment of a District Court so as to award a jury trial to the intervenors, to effect which the case was remanded, was not final so as to be the subject of review by the Supreme Court.

In LOS ANGELES BRUSH MFG. CORP. v. JAMES, JUDGE, 272 U. S. 701, there was a petition for a writ of mandamus to compel the District Court to

hear a patent case rather than to refer it to a master. This court properly held that mandamus does not lie to control judicial discretion. Moreover, since the special master was merely the arm of the court, his findings would have been subject to review on the merits. It also appeared that there was no abuse of discretion in the order of reference by reason of the fact that the hearing of the case, which was a suit for the infringement of a patent, would be protracted, and that the calendar of the court below was congested by other matters entitled to precedence. The decision in nowise involved the question of the appealable character of the order complained of.

A similar situation was present in *Ex parte* PETERSON, 253 U. S. 300, which was an application for mandamus or prohibition for relief against the appointment by the District Court of an auditor to take an account in an action at law and to report his findings to the jury for the purpose of simplifying the issues. The order complained of expressly declared that the auditor should not finally determine any of the issues in the action, the final determination of all issues of fact to be made by the jury at the trial. This was a totally different situation from that of the case at bar, where the court only retains jurisdiction to enter judgment on the award of the arbitrator. It may also be noted that in the Peterson case there was a dissent by Justices McKenna, Pitney and McReynolds.

Ex parte SIMONS, 247 U. S. 231, was a petition for mandamus to correct an error of the District Court

in ordering an action at law transferred to the equity side of the court. In an opinion written by the late Justice Holmes, it was held that the error might be corrected by granting mandamus to require the District Court to give plaintiff her right to a trial at common law, and the rule was made absolute. This decision, though cited as authority to the contrary, supports the contention of petitioners herein. There is no distinction in principle between the two cases. In the *Simons* case it was contended that the order depriving petitioner of her right to a trial at common law could be corrected by mandamus without awaiting a final disposition of the cause, and this court sustained the contention. In the case at bar it is contended by petitioners that the order depriving them of any judicial trial is a final order subject to immediate review without waiting for the decision of the Consul of a foreign nation to whom the cause should never have been referred. It would be difficult to visualize a case lending us stronger aid. We quote a paragraph from the opinion of the late and revered Justice:

> "If we are right, the order was wrong and deprived the plaintiff of her right to a trial by jury. It is an order that should be dealt with now, before the plaintiff is put to the difficulties and the courts to the inconvenience that would be raised by a severance that ultimately must be held to have been required under a mistake. It does not matter very much in what form an extraordinary remedy is afforded in this case. But, as the order may be regarded as having repudiated jurisdiction of the first count, mandamus may be adopted to require the district court to proceed and to give the plain-

tiff her right to a trial at common law. See BROWN v. BUCK, 75 Mich. 274, 5 L. R. A. 226, 13 Am. St. Rep. 438, 42 N. W. 827."

In REXFORD v. BRUNSWICK, 228 U. S. 339, it was held that the Circuit Court of Appeals erred in entertaining the appeal because the decree of the lower court disposed of only some of the issues and retained the cause for further orders with a reference to a special master to take the remaining proofs. With that decision we have no quarrel, as there was no abdication of its jurisdiction, as there is here, by the District Court.

LATTA v. KILBOURN, 150 U. S. 524, clearly states the true rule:

> "It is first contended on behalf of the appellees that this appeal cannot be entertained by this court for the reason that the decree of October 27, 1886, was the final decree in the cause from which an appeal should have been taken. We are clearly of opinion that this proposition cannot be sustained. It is well settled by the decisions of this court that where the purpose of the suit is to obtain an account, such as that prayed for by the bill in this case and directed by the order of October 27, 1886, the decree is of such an interlocutory character that no appeal will lie therefrom. BEEBE v. RUSSELL, 60 U. S. 19 How. 283, 285 (15:668); GREEN v. FISK, 103 U. S. 518 (26:486); KEYSTONE MANGANESE & I. CO. v. MARTIN, 132 U. S. 91 (33:275); LODGE v. TWELL, 135 U. S. 232 (34:153); McGOURKEY v. TOLEDO & O. C. R. CO., 146 U. S. 544, 550 (36:1083). In this last case the authorities are thoroughly reviewed as to what constitutes a final decree, and it was laid down as the general rule *that if the court*

made the decree fixing the rights and liabilities of the parties, and thereupon referred the case to a master for a ministerial purpose only, and no further proceedings in court are contemplated, the decree is final; but if it referred the case to him for a judicial purpose, as to state an account between the parties upon which a further decree is to be entered, the decree is not final."

It will thus be observed that in the pertinent decisions cited by Mr. Justice Butler, this court has established the rule that an order which fixes the rights of the parties, the court retaining only jurisdiction to render a judgment upon the report of an arbitrator or a master, or where the court denies the right to a judicial remedy to which the aggrieved party is entitled, the decree is final and appealable.

THE OPINION IN THIS CAUSE IS AT VARIANCE WITH THE OPINION OF JUSTICE BRANDEIS IN SHANFEROKE COAL AND SUPPLY CORPORATION v. WESTCHESTER SERVICE CORPORATION, 79 L. Ed. 269.

The opinion of Mr. Justice Butler misconstrues the position taken by petitioners in their supplemental brief. We did not, as stated in the opinion, abandon our claim that the order appealed from was final, but, relying on the *Shanferoke* case, we asserted that even if the order was not final, nevertheless it was appealable as an interlocutory order granting a stay which has the effect of an injunction. If the order *denying a stay* in the *Shanferoke* case was in effect an order *denying an injunction*, why is not the order *granting*

the stay in the instant case, an order in effect *granting an injunction*? It is stated in the opinion that courts of admiralty have no power to grant injunctions. The statute, however, in arbitration cases (Title 9, Section 3, U. S. C. A.), provides that the District Courts "shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, etc."

This, as pointed out in the *Shanferoke* case, has the effect of an injunction, even though it may not be called an injunction *eo nomine*. Not what the order is called, but what it is, determines its character.

It is respectfully submitted, therefore, that a rehearing should be granted and the judgment of the Circuit Court of Appeals reversed.

DATED: San Francisco, California,
March 14th, 1935.

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Proctors for Petitioners and Libelants.

I hereby certify that the foregoing petition for a rehearing is presented in good faith and not for delay.

WILLIAM F. HERRON,
of Counsel for Petitioners.